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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|-----------------------|------------------|
| 10/680,718 | 10/06/2003 | Rodney E. Smith | SMTT 321A | 2653 |
| 23581 | 7590 | 09/07/2005 | EXAMINER | |
| KOLISCH HARTWELL, P.C. 520 S.W. YAMHILL STREET SUITE 200 PORTLAND, OR 97204 | | | PECHHOLD, ALEXANDRA K | |
| | | | ART UNIT | PAPER NUMBER |
| | | | 3671 | |

DATE MAILED: 09/07/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

| | | | |
|------------------------------|------------------------|---------------------|--|
| Office Action Summary | Application No. | Applicant(s) | |
| | 10/680,718 | SMITH ET AL. | |
| | Examiner | Art Unit | |
| | Alexandra K. Pechhold | 3671 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 10/6/03.
 2a) This action is FINAL. 2b) This action is non-final.
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) _____ is/are pending in the application.
 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
 5) Claim(s) _____ is/are allowed.
 6) Claim(s) 1-19 is/are rejected.
 7) Claim(s) _____ is/are objected to.
 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____. |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date <u>filed 5/28/04</u> . | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| | 6) <input type="checkbox"/> Other: _____. |

DETAILED ACTION

Double Patenting

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1-19 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-26 of U. S. Patent No. 6,641,328. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of '328 set forth all of the claimed recitations in the instant invention.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

4. Claims 1-6, 9-11, 14, and 19 are rejected under 35 U.S.C. 102(e) as being anticipated by Faircloth, Jr. (US 5,820,751).

Regarding claim 1, Faircloth discloses an apparatus comprising a conduit terminator, seen as pipe coupling (38) in Fig. 2, operable to terminate a conduit, with an inlet opening illustrated in Fig. 5. Faircloth discloses a solid object diverter connected to the conduit terminator, seen as frame (52) and screens (64, 64') in windows (63, 63'), which define a liquid admitting cavity, seen as the holes in the screens (64, 64'). A positioner is seen as skimmer device (20) in Fig. 2. At least one solid wall is seen as the solid wall parts of frame (52) in Fig. 5. The method of extracting liquid from a body of liquid is disclosed in column 2, lines 66-67 and column 3, lines 1-12.

Regarding claim 2, Faircloth discloses a housing, seen as entire drain head (50) in Figs. 2 and 5.

Regarding claim 3, Faircloth illustrates in Figs. 2 and 5 the screens (64, 64') on windows (63, 63') in the drainhead (50).

Regarding claim 4, Faircloth depicts the drain head (50) having a wall, seen as frame (52) defining a cavity opening, seen as windows (63, 63') in Fig. 5.

Regarding claim 5, Faircloth discloses a gas vent, seen as air vent (36) in Figs. 2 and 5.

Regarding claims 6, 9, and 14, Faircloth discloses floats on opposite sides of the diverter, seen as floats (70) in Fig. 2, which can be considered as having hydrodynamic shapes.

Regarding claim 10, Faircloth discloses an object deflector seen as debris guards (74, 74') in Fig. 2.

Regarding claim 11, the diverter of Faircloth, seen as frame (52) and screens (64, 64') in windows (63, 63'), can be considered as having a hydrodynamic shape.

Regarding claim 19, Faircloth discloses the apparatus of claim 1 (as discussed above), which can be used in a method of guiding fish.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. **Claims 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Faircloth, Jr. (US 5,820,751) as applied to claim 2 above, and further in view of Truebe et al (WO 98/56241).**

Regarding claim 7, Faircloth discloses the limitations of the claimed invention except for a turbulence producing mechanism such as a venturi accelerator formed by the housing or in the housing. Truebe teaches the use of a current generating apparatus seen as a propeller. Truebe notes that current generating devices are used to guide fish away from plant intakes, pumps, turbines, etc. (page 1, lines 21-25 and page 2, lines 15-22). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the apparatus of Faircloth to include a

turbulence producing mechanism as taught by Truebe, since Truebe states on page 1, lines 21-25 and page 2, lines 15-22 that current generating devices can be used to protect fish by guiding them away from hazardous intake structures.

Regarding claim 8, Faircloth discloses at least one blocking member seen as cover (62) on drain head (50) in Fig. 5.

7. Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faircloth, Jr. (US 5,820,751). Faircloth discloses the limitations of the claimed invention except for a teardrop shape. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the shape of the apparatus of Faircloth to be a teardrop, since it is known in the art of flotation devices that a teardrop shape provides greater hydrodynamic capabilities, thereby having less resistance to traveling across a body of water.

8. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faircloth, Jr. (US 5,820,751) as applied to claim 2 above, and further in view of Araki et al (US 5,081,582). Faircloth discloses the limitations of the claimed invention except for a data acquisition unit. Araki teaches adjusting the position of a water curtain device that prevents dispersion of dangerous gas leakage by detecting position, wind direction, and tidal current in order to most effectively locate the water curtain (see abstract). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the apparatus of Faircloth to include a data acquisition unit as taught by Araki, since Araki notes in the abstract that acquiring

environmental data allows the water curtain device to be adjusted so that it can most effectively operate under the influence of environmental conditions.

9. Claims 15 and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Faircloth, Jr. (US 5,820,751) as applied to claim 14 above, and further in view of Smith (US 5,020,940).

Regarding claim 15, Faircloth discloses the limitations of the claimed invention except for first and second outer fins and respective fin spacers. Smith teaches fins (17, 18) extending outward from the boom structure as shown in Fig. 5. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the apparatus of Faircloth to include first and second outer fins with fin spacers as taught by Smith, since it is known in the art of floating devices that fins are advantageous hydrodynamic features.

Regarding claim 16, a buoyant medium could be seen in Faircloth as the float (70) or the body of water.

10. Claim 17 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faircloth, Jr. (US 5,820,751) and Smith (US 5,020,940) as applied to claim 16 above, and further in view of Sanders (US 5,491,922). Faircloth and Smith disclose the limitations of the claimed invention except for at least one of the float comprising a watertight control housing. Sanders teaches floatable booms having a drive device (26) attached to the forward end of each floatable boom (12), serving to propel the boom through the water and provide remote control (Col 8, lines 19-23). It would have been obvious to one having ordinary skill in the art at the time the invention was made to

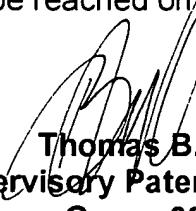
Art Unit: 3671

modify the apparatus of Faircloth including the fins of Smith to have a watertight control housing as taught by Sanders, since Sanders states in column 8, lines 19-23 that a drive device provides remote operation to propel the boom through the water, which therefore provides control of the location of the device.

11. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Faircloth, Jr. (US 5,820,751) as applied to claim 2 above, and further in view of Harding (US 4,518,495). Faircloth discloses the limitations of the claimed invention except for a tether connector. Harding teaches a pool skimmer utilizing a harness, such as ropes (5, 5) to control the movement of the framework (Col 1, lines 60-68). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the apparatus of Faircloth to include tether lines as taught by Harding, since Harding states in column 1, lines 60-68 that ropes may control the movement of the skimming device.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alexandra Pechhold whose telephone number is (571) 272-6994. The examiner can normally be reached on Mon-Thurs. from 8:00am to 5:30pm and alternating Fridays from 8:00am to 4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas B. Will, can be reached on (571) 272-6998. The fax phone number for this Group is (703) 872-9306.



Thomas B. Will
Supervisory Patent Examiner
Group 3600

AKP
8/31/05